

s 180 of our Criminal Procedure Code. The Supreme Court held that in a summary trial a magistrate court under paras (c) and (f) of s 173 (which paragraphs are in pari materia with paras (c) and (f) respectively of s 180) had no power to order a discharge amounting to an acquittal of an accused person without hearing evidence of the prosecution. That is not a decision on the provision of the Malaysian Criminal Procedure Code corresponding to section 184 of our Code. The corresponding provision in the Malaysian Criminal Procedure Code is s 254 which is somewhat different. It provides:

(i) At any stage of any trial, before the delivery of judgment, or in the case of a trial by jury before the return of the verdict, the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the accused upon the charge and thereupon all proceedings on such charge against the accused shall be stayed and the accused shall be discharged of and from the same.

(ii) At any stage of any trial before a Sessions Court or the Court of a Magistrate before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on such charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.

(iii) Such discharge shall not amount to an acquittal unless the Court so directs.

Hence, that decision is of no assistance to me.

I now turn to examine the facts before me and consider whether in the circumstances I should exercise my discretion and direct that the discharge shall amount to an acquittal. The charge in question was brought in July 1985 and relates to an offence alleged to have taken place in December 1983. The case was set down for trial on 21 April 1986. On that day, it was stood down pending the trial of the appellant on the charge in DAC 6933/85. On that trial, the appellant was acquitted without defence being called. The charge in DAC 6932/85 was then set down for further mention on 12 May 1986. There followed two postponements: one from 12 May 1986 to 13 October 1986 and the other from the latter date to 2 February 1987. On both occasions, the postponement was requested by the prosecution on the ground that a material witness was not available, and efforts were being made to trace such a witness. On 2 February 1987, the witness still could not be traced. Even at the hearing before me, ie on 31 May 1990, I was informed by the deputy public prosecutor that the position remained as it was: the material witness was still not available and could not be traced. There was also the information, which was communicated to the district judge on 2 February 1987 and which was not disputed by the prosecution, that one of the complainants had passed away. Up to this date, approximately five years have elapsed since the charge was first brought against the appellant, and the charge relates to an offence alleged to have taken place some six

A and a half years ago. Clearly, the prosecution has had ample time to trace this witness, and the witness still cannot be found, notwithstanding the efforts made; the prospect of tracing this witness does not appear to have improved. The deputy public prosecutor informed me that the prosecution intended to proceed with the charge against the appellant and the charge would be proceeded with the moment the witness is found. However, this has been the position since the charge was first brought. While I accept that the charge against the appellant is a serious one and that the right of the prosecution to proceed against the appellant on the charge should be preserved, I also have to bear in mind that it is unfair to have a charge hanging over his head indefinitely. The court has to consider both public interest and fairness to an accused person, and having regard to both these factors and all the relevant circumstances of this case it is only fair to the appellant that the charge should not be left hanging over his head any longer. In my judgment, the discharge should amount to an acquittal, and I so order. The appeal is therefore allowed.

Appeal allowed.

Solicitors: NS Kang.

Reported by S Surenthiraraj

**F Schindler Lifts (Singapore) Pte Ltd v
People's Park Chinatown Development
Pte Ltd (In Liquidation)**

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS

G NO 832 OF 1988
LAI KEW CHAI J
15 JUNE 1990

Contract — Supply and installation of materials — Materials installed but not commissioned — Agreement to defer payment — Whether materials became fixtures — Whether property had passed — Privity of contract

H *Personal Property — Chattel — Whether had become fixtures — Right of owner of chattel to retake possession — Rights subject to terms of contract*

I The plaintiffs entered into a sub-contract with the main contractors of a development project to supply and install lifts and escalators. The sub-contract provided that the conditions of the sub-contract were supplemental to the main contract entered into between the defendants (the developers) and the main contractors. In the meantime, by a letter dated 13 January 1983, the plaintiffs and defendants had agreed to defer payment of the goods supplied. By July 1986, the plaintiffs had delivered six lifts and 17 escalators to the development site and installed ten escalators. In April 1986, a winding-up petition was presented against the defendants, and a winding-up order made on

29 August 1986. The main contractors then terminated the main contract which automatically determined the employment of the plaintiffs under the sub-contract. Later the defendants' liquidator sold ten escalators to another party on the ground that they had become fixtures and therefore part of the land; the remaining seven escalators were recovered by the plaintiffs from the main contractors in legal proceedings. As regards the ten escalators, the plaintiffs sought a declaration against the defendants (in liquidation) that the escalators installed by them (but not commissioned) in the defendants' premises belonged to the plaintiffs. They also claimed in quasi-contract for the proceeds of sale of the escalators which had been sold by the liquidator. Alternatively, if their main claims were unsuccessful, they also asked for a declaration that the unfixed materials in relation to the installation of the ten escalators, namely, glass panels and handrails, were the property of the plaintiffs; and for the consequential order that the defendants, having sold them, do pay over the proceeds to them.

The plaintiffs submitted that the property in the escalators and/or the unfixed materials, which were not completely installed, commissioned or paid for, still remained with the plaintiffs and that the defendants had sold them without their authority. The defendants submitted that the escalators had become fixtures and as such part of the land belonging to the defendants; accordingly the escalators had become the property of the defendants by operation of the law.

Held, allowing the plaintiffs' claim:

(1) The installation of the ten escalators involved hoisting them into specially constructed and prepared spaces. They were in no way affixed or attached to the land or any building. As such it could not be said that the escalators had become fixtures.

(2) By the letter of 13 January 1984 regarding deferred payment, privity of contract was established between the plaintiffs and the defendants, as this indicated that property in the escalators did not pass from the plaintiffs to the defendants until full payment had been made.

(3) In this case the contract was to supply and install the escalators. They were never commissioned nor tested to the satisfaction of the main contractor or the architects. Accordingly the property in the escalators never passed to the defendants.

(4) It was the clear intention of the plaintiffs and the defendants, as set out in cl 14 of the main contract, that property in the goods should not pass to the defendants except upon payment after the issue of the interim certificates. There was therefore an implied term in the contract that the plaintiffs were conferred the right to enter upon the site, unfix the escalators and retake possession of them. Further, this was a contract to make up materials and fix them. By the nature of this type of contract, property in any goods would not pass until they have been fixed.

(5) The ten escalators, including the unfixed glass panels and the handrails belonged to the plaintiffs. The defendants were ordered to account for and pay over to the plaintiffs the proceeds of the sale of the goods with interest.

[Editorial Note: The defendants have appealed to the Court of Appeal vide Civil Appeal No 44 of 1989.]

Cases referred to

- 1 *Lamine v Dorrell* (1851) 92 ER 303 (folld)
- 2 *Hobson v Gorringe* [1897] 1 Ch 182 (folld)
- 3 *Gebrueder Buehler AG v Peter Chi Nan Kwong & Ors* [1988] 2 MLJ 69 (refd)

- A 4 *Tripp v Armitage* (1839) 150 ER 1597 (folld)
- 5 *Bellamy v Davey* [1891] 3 Ch 540 (refd)
- 6 *Armitage v Haigh & Sons* (1893) 9 TLR 287 (refd)
- 7 *Dawber Williamson Roofing v Humberside County Council* (1979) 14 Build LR 70 (refd)

Jimmy Yim for the plaintiffs.

Jude Benny for the defendants.

B

Cur Adv Vult

Lai Kew Chai J: The plaintiffs, who were sub-contractors, sought a declaration against the defendants, who were developers and a company in liquidation, that ten sets of escalators which had been installed but not commissioned belong to them. They also claimed in quasi-contract for the proceeds of sale of the said escalators which had been sold by the liquidators of the defendants. Alternatively, if their main claims were unsuccessful, they also asked for a declaration that the unfixed materials in relation to the installation of the ten escalators, namely, glass panels and the handrails brought to the site and meant to be fixed, were the property of the plaintiffs and for the consequential order that the defendants, having sold them, do pay over the proceeds to them. At the conclusion of the hearing I declared that the ten escalators, including the unfixed glass panels and the handrails, belonged to the plaintiffs. I ordered that the defendants account and pay over to the plaintiffs the proceeds of the sale of these goods with interest. I awarded costs against the defendants.

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The plaintiffs submitted that the property in the escalators or, alternatively, the said unfixed materials, not having been completely installed and commissioned, and not having been paid for by the defendants, still remained with the plaintiffs and that the defendants had sold them without their authority. They contended that as between them and the defendants and as a matter of contract and by implication, they had the right to enter upon the site, unfix the escalators and retake possession of them. They abandoned their claim for damages for conversion and they also withdrew before me the proof of debt, which had included claims for the said escalators and the unfixed materials, and which they had filed with the liquidator of the defendants who had neither accepted nor rejected the proof of debt. In defence, the defendants submitted that the said escalators, in view of the material factors which were not really in dispute, had become fixtures and had become part of the land belonging to the defendants and, accordingly, such escalators had become the property of the defendants by operation of law. The defendants also disputed the plaintiffs' contention that the plaintiffs had the right in contract to unfix and retake possession of the escalators.

I now turn to the undisputed material facts. In May 1982, the plaintiffs submitted a tender to the defendants for the installation of lifts and escalators for a proposed

hotel with ancillary shopping/cinema on URA land parcel 199 at the junction of New Bridge Road and Upper Cross Street (hereinafter referred to as 'the project'). The defendants were the developers. By a letter dated 29 November 1982, the defendants' architects on behalf of the defendants accepted the plaintiffs' tender. The plaintiffs were required to sign a 'nominated sub-contract' with the main contractors, Sanpete Builders (S) Pte Ltd ('the main contractors'). The said letter of the defendants' architects stated, inter alia, as follows: 'In accepting your offer, we wish to confirm that you shall sign a nominated sub-contract with the main contractor who will be appointed in due course ...'. The letter went on to say that 'the sub-contract documents are in the course of preparation and will be ready for signature after the appointment of the main contractor'.

By a letter dated 13 January 1983, it was also agreed between the plaintiffs and the defendants, inter alia, that payment of the plaintiffs' claims would be deferred for a period of 12 months from the date of the claim, irrespective of the date of certification, and that such payment would be made directly by the defendants to the plaintiffs upon the expiry of the deferred payment period. It was also an agreed term that that letter would form an integral part of the sub-contract documents. The plaintiffs laid great stress on the contents of this letter to found their submission that, in consequence, there is privity of contract between the plaintiffs and the defendants and that this agreement for deferred payment by the defendants plainly indicated that as between them property in the escalators did not pass from the plaintiffs to the defendants until full payment had been made to and received by the plaintiffs.

On or about 6 December 1984, the plaintiffs signed the sub-contract with the main contractors. It was provided that the conditions of the sub-contract were supplemental to the main contract dated 22 May 1984 and entered into between the defendants and the main contractors.

I should now set out the relevant provisions in the sub-contract and in the main contract and it has to be borne in mind that the parties thereto are respectively the plaintiffs and the main contractor and the main contractor and the defendants. By the sub-contract, the plaintiffs agreed with the main contractor to install and complete the installation of the lifts and escalators in accordance with the specifications and drawings and as stipulated in the defendants' architects' letter of 29 November 1982 at the contract value stated to be \$5.68m. By cl 2 of the sub-contract they agreed to execute and complete the sub-contract works to the reasonable satisfaction of the main contractor and of the defendants' architects. As is usual in such cases, they also agreed by cl 3(a) of the sub-contract to observe and perform those terms and conditions in the

A main contract which relate to the sub-contract works and to indemnify the main contractor for any liability arising in respect of the sub-contract works.

B So far as the testing of the escalators was concerned, the obligation of the main contractor to the defendants under the main contract was set out in art 78 of the Additions to the Conditions of Contract. By virtue of cl 3(a) of the sub-contract, this obligation to test the escalators was passed on to the plaintiffs.

C There is no express provision in the sub-contract on the question of the passing of property to be used in the sub-contract works. It is relevant to set out cl 14 of the main contract. It reads as follows:

D Unfixed materials and goods intended for, delivered to, and placed on or adjacent to the works shall not be removed except for use upon the works unless the architect has consented in writing to such removal which consent shall not be unreasonably withheld. Where the value of any materials or goods has in accordance with cl 30(2) of these conditions been included in any interim certificate under which the contractor has received payment, such materials and goods shall become the property of the employer, but subject to cl 20(B) or 20(C) of these conditions (if applicable), the contractor shall remain responsible for loss or damage to the same.

E I should note that under the main contract it was agreed that the main contractor shall remain responsible for loss or damage of the materials and goods within cl 14 and that cll 20(B) and 20(C), which were only applicable where the employer/defendants had agreed to bear such loss and damage, were accordingly deleted from the conditions of the main contract.

F By July 1986, the plaintiffs had delivered six lifts and 17 escalators to the site. The 17 escalators represented the full complement required under the sub-contract. The six lifts were for use in the 'podium' block. Eight 'tower-block' lifts were not supplied because the project was abandoned before their due date of delivery. Ten of the escalators had been installed and such installation involved hoisting them into specially constructed spaces where they rested on their own weight. It was common ground that these escalators were in no way affixed or attached to the land or any building. Before each escalator was hoisted into place, the area on which it was to rest, ie the sill, was prepared for it. Such preparation required all uneven edges, blobs of cement etc to be flattened so that an even surface was obtained. Rubber metal pads, which absorbed vibrations, were then laid on the concrete. No screws, bolts or other means of attachment were used to hold down the rubber metal pads. On top of these pads were placed the escalators. They were all installed in their respective positions in the building awaiting commissioning. The escalators were specifically designed and manufactured for the building in question and vice versa the relevant parts of the building had been constructed to fit the specifications of the escalators which were moving

staircases intended to remain permanently as a means of more effectually enjoying the use of the premises.

On 23 April 1986, a winding-up petition was presented against the defendants and on 29 August 1986 a winding-up order was made against them. Shortly thereafter the main contractor terminated the main contract and that automatically determined the employment of the plaintiffs under the sub-contract. By a letter dated 20 March 1987 to the defendants' liquidator, the plaintiffs stated that they were willing to reduce their claims against the defendants by \$1,480,590 if they were allowed to retake and repossess all 17 escalators. On 27 July 1987, the liquidator claimed that the plaintiffs were unsecured creditors and declined the plaintiffs' offer. In September 1987, the plaintiffs learned that the project and the development had been sold. In November 1987, the plaintiffs through their solicitors wrote to the defendants' liquidator that as they expected the project to proceed under the new developer they had no interest to repossess the escalators. They had entertained the hope, which turned out to be in vain, that they could contract with the new developer to use the Schindler lifts and escalators on the site.

In early 1988 the plaintiffs were surprised to learn that the defendants' liquidator had sold ten escalators to another party. They remonstrated with the defendants' liquidator who later asserted that a quantity surveyor had advised that the ten escalators had become fixtures and that the seven other escalators which were not installed had been removed by them and stored in an undisclosed site. In the event, the plaintiffs commenced action against the main contractor for the return of the seven escalators which they recovered.

On 19 December 1986, the plaintiffs filed their proof of debt. The claim was for the sum of \$2,617,496.60 made up of (a) certified progress claims of \$1,979,539; (b) interest on the certified progress claims of \$135,197.10; (c) retention on material delivered to site but not installed of \$268,513.50; and (d) cancellation costs for the tower block lifts of \$234,255. The worth of the ten escalators amounted to \$762,339 of the first item and \$61,811 of the third item reflected the value of the unfixed glass panels and handrails of the escalators. The defendants' liquidator informed the plaintiffs that the question of admission or rejection of the plaintiffs' proof of debt was held over pending an investigation of the plaintiffs' claims.

On 5 January 1989, the main contractor was wound up by the High Court as a result of a debt of \$4.1m incurred in connection with the project with which the plaintiffs and the defendants were concerned.

On 25 August, 1988 the plaintiffs filed this originating summons which was heard before me on 16 and 18 May 1989 at the conclusion of which I made the

A declarations and the orders I mentioned earlier in this judgment. I ordered the defendants to pay over the proceeds of the goods in lieu of damages for conversion in accordance with what was decided in *Lamine v Dorrell*.¹ That case laid down the proposition that where a man takes goods to which he has no right and sells them, the owner may waive the tort of conversion, and recover the price for which they were sold in an *indebitatus assumpsit* for money had and received.

B In my judgment it was the clear intention of the plaintiffs and the defendants that property in the goods shall not pass to the defendants except upon payment after the issue of the interim certificates. There was, therefore, an implied term in the contract between them that the plaintiffs were conferred the right to enter upon the site, unfix the escalators and retake possession of them. *Hobson v Gorringe*² decided that a chattel upon becoming a fixture in law would pass as part of the freehold to a mortgagee and that even if a licence to remove the chattel could be implied from the mortgagee leaving the mortgagor in possession, the entry of the mortgagee into possession would determine such a licence. That proposition of law governed the rights of the owner of the chattel which had become fixtures and a third party owner of the legal estate such as a mortgagee or bona fide purchaser without notice. In my view, the nature of the plaintiffs' rights to the goods was the same as that of Hobson in *Hobson v Gorringe*² where at p 192 AL Smith LJ said:

F It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture — ie part of the soil — when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture, ie part of the soil — subject to the right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser.

H These principles were applied in *Gebrueder Buehler AG v Peter Chi Man Kwong & Ors*.³

I The intention of the parties as to the passing of property in goods had to be implied in the absence of any express provision in the contract. It had to be noted that this was not a contract for the sale and purchase of goods but a contract to make up materials and fix them. By the nature of the latter type of contract, property in any goods would not pass until they have been fixed: see *Tripp v Armitage*⁴ at p 1602 per Lord Abinger; *Bellamy v Davey*;⁵ and *Dawber Williamson Roofing v Humberside County Council*⁷ applied the principle in *Tripp v Armitage*.⁴

In this case the contract was to supply and install the escalators. They were never commissioned nor tested to the satisfaction of the main contractor and the architects. Accordingly, the property in the escalators never passed to the defendants.

Claim allowed.

Solicitors: *Drew & Napier; Joseph Tan Jude Benny & Co*

Reported by *Azra Moiz*

Seow Francis v Comptroller of Income Tax

HIGH COURT (SINGAPORE) — CRIMINAL MOTION NO 32
OF 1988
LAI KEW CHAI J
12 JUNE 1990

Criminal Procedure — Transfer of criminal case from subordinate courts to High Court — Questions of law of unusual difficulty — Applicant a politician and professional person — Criminal Procedure Code (Cap 68, 1985 Ed), s 185(1)(b)

The appellant was charged with four counts of evasion of income tax under s 96(1)(a) and two counts under s 96(1)(d) of the Income Tax Act (Cap 134, 1985 Ed). They were due to be heard from 5 to 23 December 1988 in the subordinate courts. The applicant applied for an order that the summonses be transferred from the subordinate courts to the High Court pursuant to s 185 of the Criminal Procedure Code (Cap 68, 1985 Ed), on the ground, inter alia, that there were questions of law of unusual difficulty to be tried.

Held, dismissing the application:

(1) The only two issues before the court would be whether the applicant had omitted to declare certain earned income in his income tax returns and, if he did, whether the omission was wilful. District judges are perfectly competent to try the sort of cases with which the appellant was concerned.

(2) On the applicant's contention that the matters should be heard in the High Court, bearing in mind that due to the grave consequences to him as a politician and professional, public interest was involved, the court was of the view that the real question was whether this court could fairly and legitimately treat politicians who were charged differently from accused persons who were not politicians. All accused persons should be treated equally regardless of status.

Cases referred to

- 1 *Measor & Anor v PP* [1972] 1 MLJ 195 (folld)
- 2 *Wong Hong Toy & Anor v PP* [1986] 2 MLJ 336 (folld)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Ed) s 185(1)(a), (b), (c)
Income Tax Act (Cap 134, 1985 Ed) s 96(1)(a), (d)

VK Dube for the applicant.

Lawrence Ang (Yong Ing Loong with him) for the respondent.

Cur Adv Vult

- A** **Lai Kew Chai J:** By this criminal motion, the applicant applied for an order that Income Tax Summons Case Nos 90142 to 90147 of 1988 be transferred from the subordinate courts and heard in the High Court pursuant to s 185 of the Criminal Procedure Code (Cap 68, 1985 Ed). At the conclusion of the hearing of the criminal motion, I held that the application did not, in my judgment, come within s 185(1)(a), (b) or (c) of the CPC and accordingly dismissed it. I indicated that I would give my reasons later. This I now do.

For present purposes, the relevant statutory provisions in the CPC which require recital are as follows:

- C** 185(1) Whenever it is made to appear to the High Court that —
(a) a fair and impartial inquiry ... trial cannot be had in any criminal court subordinate to it;
(b) some question of law of unusual difficulty is likely to arise; or
- D** ...
(e) such an order is expedient for the ends of justice ..., it may order that —
...
(ii) any particular criminal case shall be transferred to and tried before the High Court.
- E** The appellant was charged with four counts of evasion of income tax under s 96(1)(a) and two counts under s 96(1)(d) of the Income Tax Act (Cap 134, 1985 Ed). The relevant income tax summonses were due to be heard on 5 December 1988 to 23 December 1988 in Court No 10 of the subordinate courts. In support of the criminal motion, the applicant filed an affidavit which contained 40 paragraphs. As I was satisfied that it contained irrelevant and scandalous matters, pursuant to O 41 r 6 of the Rules of the Supreme Court 1970, I ordered that except for eight paragraphs the other paragraphs of the affidavit be expunged.
- G** The first contention of the applicant was that there were questions of law of unusual difficulty to be tried in this case, within the meaning of s 185(1)(b) of the CPC. However, an analysis of the charges would disclose that the only two issues before the trial courts would be whether the applicant had omitted to declare certain earned income in his income tax returns and, if he did, whether the omission was wilful. It is beyond dispute that district judges are perfectly competent to try the sort of cases with which the appellant was concerned: see *Measor & Anor v PP*.¹

- I** The applicant's second contention was based on his status as a non-constituency Member of Parliament and as a professional person. In the penultimate paragraph of his affidavit the applicant asserted that 'previous prosecutions of political figures in the subordinate courts and their erroneous convictions led to disquiet and allegations of executive interference in the subordinate courts judi-